Supreme Court U.S.
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IN THE

Supreme Court of the United States

October Term, 1980

No. 80-506

JEROME A. KAPLAN, PETITIONER

v.

RILEY POINTER and PAUL S. SHUPP,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the appellate court failed to follow this Court's holding in *Willingham* v. *Morgan*[1] when the appellate court *sua sponte* remanded to the local District of Columbia courts a case which had previously been removed from those courts and in which two employees of the General Services Administration (GSA) sued a GSA official alleging that the GSA official had made threatening and harrassing telephone calls to them despite the fact that:

1) the GSA official's duties required him to oppose the grievances and Equal Employment Opportunity complaints filed by these two GSA employees;

2) the GSA official's only contact with the GSA employees arose from the performance of his duties as an officer of the federal government;

3) the GSA official asserted his official immunity as a defense to the suit;

4) the GSA official's petition removing the case to the federal district court under 28 U.S.C. § 1442(a)(1) together with the other pleadings in this case specifically alleged that his only contacts with the GSA employees had been in connection with his official GSA duties;

5) the GSA employees did not oppose the removal petition; and

6) the GSA employees had always alleged in prior proceedings that they were suing the GSA official for acts within the scope of his duties.

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[1] *Willingham* v. *Morgan*, 395 U.S. 402 (1969).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Jerome A. Kaplan petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-captioned case.

OPINIONS BELOW

Neither the United States Court of Appeals for the District of Columbia Circuit nor the United States District Court for the District of Columbia published an opinion in this action. A copy of the order of the District Court is attached hereto as Appendix A. A copy of the order of the Court of Appeals is attached hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 30, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1442(a)(1) of Title 28 of the United States Code provides:

> (a) A Civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> > (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

STATEMENT OF THE CASE

On February 23, 1979, respondents Riley Pointer and Paul Shupp, two employees of GSA, filed a complaint in the Superior Court of the District of Columbia against petitioner Jerome A. Kaplan, a GSA official, alleging that Mr. Kaplan had made harrassing and threatening telephone calls to them. Out of this litigation, a critical

issue has emerged for resolution by this Court: the right of a federal official to remove from a local court to a federal court an action brought against him, when the record demonstrates that the official's contact with the plaintiffs arose solely in the course of the official's duties.

Petitioner Jerome A. Kaplan is a supervisory Labor-Management Specialist at GSA. His duties include serving as GSA's representative in all its dealings with the twenty-eight local unions representing workers in GSA's Washington, D.C., buildings, and supervising the investigation of grievances and Equal Employment Opportunity ("EEO") complaints.

Respondent Riley Pointer was employed by GSA until 1978 as a maintenance engineer. He also served as chairman of his union's local Grievance Committee. In that capacity, Mr. Pointer represented himself and other union members in connection with grievances as well as the prosecution of EEO complaints against GSA.

Respondent Paul Shupp is a watch foreman at GSA's Agricultural Field Office and was Mr. Pointer's immediate supervisor.

It is Mr. Kaplan's job to represent GSA in negotiations and arbitration hearings flowing from grievances brought by members of Mr. Pointer's local union (which is but one of twenty-eight for which Mr. Kaplan has responsibility). Mr. Kaplan also serves as GSA's representative in certain EEO cases. His role is to investigate the cases and to decide whether GSA should offer to settle. In those cases in which settlements are not reached, Mr. Kaplan represents GSA in the contested proceedings that follow. Mr. Kaplan had been Mr. Pointer's and Mr. Shupp's adversary in several contested proceedings. Occasionally, Mr. Kaplan spoke with Mr. Pointer by telephone to gather

information about their grievances or to work towards resolution of their complaints.

1. The Telephone Calls.

In February or March of 1975, Messrs. Pointer and Shupp began to receive anonymous telephone calls at their homes. The caller would identify himself by fictitious names such as "Big Mac from McDonalds." The caller's voice appeared to be disguised. Later, in April or May of 1975, the calls contained threats, such as: "This is Big Mac. We got a contract out on you." "This is Black Power. We have a contract out on you." "Go out to the cemetery and dig a hole and wait until we get there."

At an unspecified point in the summer of 1975, the telephone calls stopped coming to Mr. Pointer's and Mr. Shupp's homes. Instead, after a gap of about two to three weeks, Messrs. Pointer and Shupp began to receive similar calls at work.

As the months went on, the calls became much less frequent, until the last one was reported by one of respondents' co-workers on April 11, 1976, about a year after they had begun. During the year that the calls were made — and in the four and one-half years since — no actual attempt has been made to harm either Mr. Pointer or Mr. Shupp.

The Federal Bureau of Investigation, GSA, and the Civil Service Commission all attempted to establish the identity of the caller. No suspects were developed by any of the agencies, and the identity of the caller was never established.

2. Procedural History

a. The First Suit in Federal District Court.

On April 21, 1977, Messrs. Pointer and Shupp filed a complaint in the United States District Court for the District of Columbia seeking four million dollars ($4,000,000.00) in damages. The complaint named seven defendats[2] including Mr. Kaplan. The complaint charged that Mr. Kaplan had made threatening and harrassing telephone calls to Messrs. Pointer and Shupp.[3] Two

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[2]The other defendants were all officers of GSA, starting with the Administrator and working down through the entire chain of command to plaintiffs' immediate supervisor. The United States Attorney assigned to represent all GSA officials perceived a potential conflict of interest between the defendants that he represented. If Messrs. Pointer and Shupp were able to prove their allegations, the conflict might have become actual. Further, if the allegations were proven, the United States might decide to prosecute Mr. Kaplan, which would be difficult or impossible if a United States Attorney had received confidential communications from Mr. Kaplan. Accordingly, the undersigned firm was retained by the Department of Justice to represent Mr. Kaplan. After three and one half years of litigation, Messrs. Pointer and Shupp have yet to prove their allegations but the potential conflict of interest remains. We have cooperated closely with the United States Attorney's office for the District of Columbia in the defense of this case and have consulted with that office about the filing of this petition. We note this background because in this context the Court may wish to solicit the views of the Department of Justice concerning the issues raised by this case.

[3]Mr. Kaplan denies that he made the calls. Interestingly, the allegation in the complaint that Mr. Kaplan made the calls is the only direct statement ever made by the defendants that Mr. Kaplan was the caller. On discovery, Mr. Pointer would only say that he had "a strong belief" (but no evidence) that Mr. Kaplan made the calls. Mr. Shupp was unable to identify the voice on the phone. During the more than one year of discovery, no witness could be found to testify that Mr. Kaplan made the calls. Not one of the many investigators (including GSA, FBI, CSC, and an independent examiner hired by GSA) has ever identified the caller. Messrs. Pointer and Shupp are evidently aware that they cannot be sued for defamation for statements made in

counts were stated: Count One alleged a *Bivens*[4]-type violation of Mr. Pointer's and Mr. Shupp's federal constitutional rights by the making of the calls (allegedly by Mr. Kaplan) and by the subsequent failure (by the other defendants) to investigate the matter of who was making the calls; Count Two alleged, under pendent jurisdiction, that the making of the calls amounted to the local common law tort of intentional infliction of emotional distress.

After a year of full discovery, defendants, including Mr. Kaplan, filed motions for summary judgment and dismissal. On January 12, 1979, the Honorable Thomas A. Flannery granted summary judgment as to six of the seven defendants. As to Mr. Kaplan, the district judge held that there was a factual dispute concerning whether Mr. Kaplan had made the calls.

Accordingly, the district judge denied Mr. Kaplan's motion for summary judgment but went on to grant Mr. Kaplan's motion to dismiss on the ground that Messrs. Pointer and Shupp had failed to state a violation of their federal constitutional rights. Respondents did not appeal the court's order.

The district judge's order of dismissal specifically reserved the right of Messrs. Pointer and Shupp to file a local action in the Superior Court of the District of Columbia alleging that the telephone calls amounted to the common law tort of intentional infliction of emotional distress.

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court; they have been careful never to repeat their assertion in any of the dozens of letters, complaints, grievances, and charges that they have filed.

[4]*Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971).

b. **The Second Suit in the Local District of Columbia Court: Grounds for Removal.**

Messrs. Pointer and Shupp subsequently filed a complaint in the Superior Court for the District of Columbia naming Mr. Kaplan only. The complaint charged Mr. Kaplan with the intentional infliction of emotional distress by means of the harrassing telephone calls and claimed two million dollars ($2,000,000.00) in damages.

Paragraph 10 of the Superior Court complaint alleged that:

> . . . Mr. Jerome Kaplan [is] Special Assistant to the Director, Management Operation [sic] Division, Public Building [sic] Service, Region 3, General Services Administration.

Paragraph 2 of the same complaint alleged Mr. Shupp's employment by the federal government. Paragraph 3 set forth Mr. Pointer's federal employment, adding that at the relevant times Mr. Pointer had been Chairman of the Grievance Committee of his local union and that he was in addition active in the prosecution of EEO complaints against GSA.[5]

The substantive acts alleged in the Superior Court complaint were acts that, if committed at all, would have arisen out of the relationship that Messrs. Pointer and

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[5]Messrs. Pointer and Shupp claim to have filed more than forty complaints against GSA. The files in these cases are so voluminous and duplicative that no one can say with certainty how many separate cases are involved. The actual number of separate complaints that resulted in formal proceedings is probably closer to twelve: seven for Mr. Pointer, and five for Mr. Shupp. Mr. Pointer has filed at least two new complaints since this litigation began, including one filed after he retired from government employment.

Shupp and Mr. Kaplan had by virtue of their mutual government employment. Since Mr. Kaplan was a federal official who had been sued for alleged acts committed under color of his office, he filed a petition to remove the case to federal court pursuant to 28 U.S.C. § 1442(a)(1).[6] Messrs. Pointer and Shupp did not oppose the petition, and the case was accordingly removed to federal district court.

c. **Litigation After Removal.**

In federal district court, Mr. Kaplan then moved for summary judgment on the ground that as a federal official he was absolutely immune to suit on a common law tort. *Butz* v. *Economou,* 438 U.S. 478, 495 (1978), *citing Barr* v. *Matteo,* 360 U.S. 564 (1959). On July 12, 1979, after receiving two *pro se*[7] oppositions from Messrs. Pointer and Shupp, the district judge granted Mr. Kaplan's motion and dismissed the case with prejudice.

Messrs. Pointer and Shupp appealed *pro se* to the Court of Appeals for the District of Columbia Circuit on October 2, 1979. The sole argument that they raised on appeal was that Mr. Kaplan's official immunity did not extend to the acts alleged in the complaint - threatening and harassing phone calls. Messrs. Pointer and Shupp did not argue that the case had been erroneously removed from

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[6]The removal provisions of 28 U.S.C. §1442 are made applicable to the District of Columbia by 28 U.S.C. § 1451.

[7]After removal to federal court had been effectuated, counsel to Messrs. Pointer and Shupp moved to withdraw, stating that the Superior Court complaint had been filed "solely to preserve the Plaintiffs' rights under District of Columbia law" and that "continued representation would reflect on [counsel's] professional competence and integrity." The district judge granted counsel's request to withdraw and permitted Messrs. Pointer and Shupp to proceed *pro se*.

Superior Court. Instead, they contended that if Mr. Kaplan had made the calls, he had acted on a frolic of his own; was therefore not acting within the scope of his official duties; and so was not immune to suit.

The Court of Appeals for the District of Columbia Circuit denied oral argument and on June 30, 1980, issued an order vacating the district court's judgment and remanding the case with directions that it be returned to the Superior Court of the District of Columbia. The grounds upon which the Court of Appeals based its judgment, none of which had been raised, briefed, or argued in the district court or in the court of appeals, were stated as follows:

> From the face of the record, and the representation in appellant's [*sic*] brief that appellee's alleged liability derives from acts outside the scope of his official authority, it appears that this case was not subject to removal from the Superior Court for the District of Columbia, *see* 28 U.S.C. § 1442(a)(1), and that the United States District Court therefore did not have jurisdiction to entertain it on removal.

(The actual judgment is reproduced in Appendix B.)

Mr. Kaplan argues to this Court that the Court of Appeals applied an erroneus standard for determining the appropriateness of removal and reached a conclusion that is in direct conflict with *Willingham* v. *Morgan, supra,* decided by this Court.

REASONS FOR GRANTING THE WRIT

"This case raises some important questions about the power of federal officials to have actions brought against them removed to the federal courts." So began Mr. Justice

Marshall in his dispositive opinion in *Willingham* v. *Morgan*, 395 U.S. 402 (1969), which established the test for removal of civil actions under 28 U.S.C. § 1442(a)(1). So we begin now. The Court of Appeals for the District of Columbia Circuit failed to apply to our case the standard for removal formulated in *Willingham*.

1. THE COURT OF APPEALS' SUA SPONTE REMAND TO THE LOCAL COURTS IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN WILLINGHAM.

Willingham v. *Morgan* presented to this Court facts parallel to those at issue here. Willingham and Jarvis were the warden and chief medical officer of the United States Penitentiary at Leavenworth, Kansas. Morgan was a prisoner at the penitentiary when he filed suit in the Leavenworth County District Court of Kansas. Morgan alleged that Willingham and Jarvis had on several occasions inoculated him with drugs, assaulted him, and beaten him.

Willingham and Jarvis filed a petition to remove the action to the United States District Court for the District of Kansas, invoking 28 U.S.C. § 1442(a)(1), which allows removal to federal court of any civil action against "[a]ny officer of the United States . . . for any act under color of such office . . ." The federal district judge denied the prisoner's motion to remand the case to the Kansas state court and granted summary judgment to the prison officials, holding they were immune to a suit for damages under *Barr* v. *Matteo*, 360 U.S. 564 (1959).

The prisoner appealed to the Tenth Circuit, which found that the district court should have remanded to the state court. Not deciding the immunity question, the court of appeals reversed the district court and remanded the case with instructions to remand to the state courts.

This Court granted certiorari to consider whether the court of appeals had erroneously decided the removal question. The Court concluded the court of appeals had erred and reversed.

a. This Court in Willingham Drew the "Color of Office" Test in Broad Terms.

In reversing the appellate court in *Willingham,* this Court resolved several issues under Section 1442(a)(1) that had been particularly troubling. First, Mr. Justice Marshall, writing for a unanimous Court, set forth the test for determining whether a federal official meets the "under color of office" language of Section 1442(a)(1). The Court stated:

> Past cases have interpreted the "color of office" test to require a showing of a "causal connection" between the charged conduct and asserted official authority. *Maryland* v. *Soper* (No. 1), 270 U.S. 9, 33 (1926). "It is enough that [petitioners'] acts or [their] presence at the place in performance of [their] official duty constitute the basis, though mistaken or false, of the state prosecution." *Ibid.*

395 U.S. at 409. The Court thus held that it is sufficient to justify removal for a federal official to show that his relationship to a plaintiff derives solely from his official duties.

Applying its "color of office" test to the facts in *Willingham,* the Court found sufficient evidence to hold that the prison officials were entitled to removal. The Court stated:

> In this case, once petitioners had shown that their only contact with respondent occurred inside the penitentiary, while they were performing their duties, we believe that they had demonstrated the required "causal connection." The connection consists, simply enough, of the undisputed fact that petitioners were on duty, at their place of federal employment at all relevant times.

395 U.S. at 409

Under this Court's "color of office" test in *Willingham,* Mr. Kaplan is entitled to removal under Section 1442(a)(1). Mr. Kaplan has demonstrated the appropriate "causal connection" between his official duties and the acts of which respondents complain. As in *Willingham,* the relationship of Messrs. Pointer and Shupp to Mr. Kaplan derived only from Mr. Kaplan's performance of his duties at GSA. Any telephone conversations Mr. Kaplan may have had with Messrs. Pointer and Shupp arose strictly in the context of Mr. Kaplan's duties as a GSA labor/management specialist. But for the requirements of Mr. Kaplan's work, he would not have had occasion to speak with Messrs. Pointer and Shupp at all, nor would the claims asserted against him by Messrs. Pointer and Shupp have arisen. It is precisely this type of situation that Section 1442(a)(1) was designed to meet, and it is precisely for this type of situation that the protections of a federal forum are required in order to vindicate federal interests.

2. Removal Is Particularly Important in Cases in Which the Federal Official Asserts His Official Immunity, Which He Enjoys As a Matter of Federal Law.

Removal of this action to federal court effectuated the compelling policies underlying Section 1442(a)(1). As ex-

plicitly recognized by this Court in *Willingham*, removal to a federal forum is particularly appropriate in cases in which the federal official being sued asserts as a defense his immunity to suit, an immunity that arises under federal law.

In *Willingham*, the Tenth Circuit conceded that the prison officials might be protected from suit by the official immunity doctrine. But the Tenth Circuit in remanding to state court held that the "color of office" test of Section 1442(a)(1) was "much narrower" than the test for official immunity, 383 F.2d at 142, and so remanded.

Mr. Justice Marshall emphatically disagreed. He wrote:

> The federal officer removal statute is not "narrow" or "limited." *Colorado* v. *Symes*, 286 U.S. 510, 517 (1932). At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law. . . *In fact, one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court.* The officer need not win his case before he can have it removed. In cases like this one, Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum. This policy should not be frustrated by a narrow grudging interpretation of §1442(a)(1).

395 U.S. at 406-407 (emphasis added).

Thus this Court in *Willingham* affirmed what the District of Columbia Circuit Court of Appeals failed to recognize in Mr. Kaplan's case. One of the most important policies behind Section 1442(a)(1) is to give a federal official a federal forum in which to defend himself against charges

arising from the very nature and performance of his federal duties. Effectuation of this policy is particularly important where a federal official asserts an official immunity defense.

The appellate court in this case never mentioned the issue of Mr. Kaplan's official immunity defense which had been briefed by the parties. Nor did it consider Mr. Kaplan's assertion that whatever telephone calls he may have made to Messrs. Pointer and Shupp were made in performance of his duties as negotiator on behalf of GSA. Instead, the court of appeals remanded using the very standard rejected by this Court in *Willingham.*

c. The Court of Appeals Erroneously Relied on Allegations in the Appellate Brief of Pointer and Shupp in Determining That the Record Supported a Remand of This Action to the Local Courts.

In remanding this case, the court of appeals relied on representations made by Messrs. Pointer and Shupp in their appellate brief that Mr. Kaplan had acted outside the scope of his official duties in committing the acts alleged.[8]

The appellate court's approach to this issue contravenes this Court's ruling in *Willingham.* This Court noted that the prisoner in *Willingham* had asserted in his motion for remand that the prison officials were acting "on a frolic of their own which had no relevancy to their official duties as employees of officers of the United States." 395 U.S. at 407. The Court rejected this assertion as a basis for removal, holding:

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[8]From. . . the representation in appellant's [*sic*] brief that appellee's alleged liability derives from acts outside the scope of his official authority, it appears that this case was not subject to removal. . ." Court of Appeals order, June 30, 1980, Appendix B.

> If the question raised is whether [petitioners] were engaged in some kind of "frolic of their own" in relation to respondent, then they should have the opportunity to present their version of the facts to a federal, not a state, court. This is exactly what the removal statute was designed to accomplish.

395 U.S. at 409.

Messrs. Pointer and Shupp also asserted that "Appellee went off on a frolic of his own. . ." (Court of Appeals Brief for Appellants at 6). As recognized in the above quote from *Willingham,* mere allegations by a plaintiff cannot in logic determine the question of removal. If a plaintiff's allegation that a federal official acted on a frolic can determine the removal issue, then a plaintiff can always defeat removal simply by asserting that the official was acting beyond the scope of his duties. By this tactic, the plaintiff could invariably force the federal official to prove his immunity defense in state court, which is exactly what this Court said in its unanimous opinion in *Willingham* should not happen.

The proper focus for determining the appropriateness of removal, according to this Court's decision, is on the federal official's pleadings. In *Willingham,* the prison officials' sole assertion with respect to the "color of office" test was made in their motion for summary judgment. In that document, they alleged that their only contact with the prisoner occurred in the performance of their official duties. Mindful that the proper inquiry for removal must be "whether the record in this case will support a finding that respondent's suit grows out of conduct under color of office," 395 U.S. at 407, this Court held that the prison officials had established grounds for removal, even though a

separate pleading apart from the removal papers had to be consulted to reach that result.

Here the result is more directly arrived at. The complaint of Messrs. Pointer and Shupp howed on its very face that their relationship to Mr. Kaplan arose out of their mutual federal employment. (See language quoted from the complaint at Page 7, above.) Similarly, Mr. Kaplan more than adequately alleged the "causal connection" between his official duties and the acts complained of by Messrs. Pointer and Shupp. Mr. Kaplan asserted in his Petition for Removal that respondents "[seek] personal money damages for alleged acts committed by Petitioner under color of Petitioner's office as Special Assistant to the Director, Regional Executive Office, General Services Administration ["GSA"], Region 3."

Mr. Kaplan's assertion that his relationship to respondents existed only within the limits of his official duties was repeated in his brief to the United States Court of Appeals for the District of Columbia Circuit (Court of Appeals Brief for Appellee, at 28-30).

Moreover, Messrs. Pointer and Shupp have always heretofore acquiesced in Mr. Kaplan's assertion that he was acting under color of his office. In their original suit against Mr. Kaplan and the other GSA officials, Messrs. Pointer and Shupp emphatically took the position that Mr. Kaplan was acting within the scope of his official duties in connection with all telephone calls attributed to him. In the first suit in their opposition to Mr. Kaplan's Motion for Summary Judgment, at Page One, for example, counsel for Pointer and Shupp emphasized that they were ". . . suing Defendant Kaplan . . . for actions taken within the outer parameter [*sic*] of his duties as a federal employee, and while acting under color of authority." Again, at Page Three of the same pleading, counsel

reiterated that "the actions complained of by Plaintiffs . . . were taken within the outer parameter [*sic*] of Defendant Kaplan's job authority."

In addition to their express recognition that Mr. Kaplan was at all times acting within the limits of his authority, Messrs. Pointer and Shupp implicitly admitted as much in their present complaint, which refers to Mr. Kaplan exclusively as a GSA official. Moreover, Pointer and Shupp did not object to the removal petition that brought this case to the federal district court. That removal petition, as noted, was explicitly based on the fact that Mr. Kaplan was being sued for acts performed under color office as a federal official. No one ever questioned the validity of the removal in this case until the Court of Appeals raised the issue *sua sponte* in its order remanding.[9]

d. Apart From This Case, the Lower Federal Courts Have Been Consistent in Construing the "Under Color of Office" Test Broadly Since This Court's Decision in Willingham.

Mr. Kaplan has met this Court's criteria for removal under Section 1442(a)(1). That removal is appropriate in Mr. Kaplan's case is further demonstrated by the cases decided by the lower federal courts since *Willingham*. *Malone* v. *Longo*, 463 F.Supp. 139 (E.D.N.Y. 1979), for example, held that, under *Willingham*, a nurse employed in a Veterans Administration hospital was entitled under 28 U.S.C. § 1442(a)(1) to remove an action for defamation

[9]Messrs. Pointer and Shupp did argue vigorously in their brief in the Court of Appeals that the district judge was incorrect in holding that Mr. Kaplan was immune to suit. Their argument was based on the assertion that Mr. Kaplan forfeited his immunity by acting beyond the scope of his duties. The Court of Appeals apparently confused this argument with the "under color of office" test for removal. However, as this Court pointed out so clearly in *Willingham*, though the words are similar, the removal standard is far broader than the immunity standard.

brought against her by a co-worker. The district court stated:

> [O]ur inquiry is limited to whether plaintiff's action arises out of acts performed by defendant under color of office.
>
> The answer is simple. The phrase must be broadly construed. *Areskog* v. *United States,* 396 F.Supp. 834, 838 (D.Conn. 1975). It is sufficient therefore that defendant's objectionable contact with plaintiff occurred inside the Veterans Administration Hospital while plaintiff was performing her official duties and that the relationship between the parties derived solely from their official duties. *See Willingham* v. *Morgan,* 395 U.S. at 409. Since defendant acted under color of federal office, her right of removal is absolute. Hence, plaintiff's motion to remand is denied.

463 F. Supp. at 142. *See also Williams* v. *Williams,* 427 F.Supp. 557 (D.Md. 1976); *District of Columbia* v. *Landmark Services,* 411 F.Supp. 1002 (D.D.C. 1976); *Klein* v. *Robinson,* 328 F.Supp. 417 (E.D.N.Y. 1971), *aff'd per curiam,* 468 F.2d 619 (2d Cir. 1972). The court in *Malone* and the other federal courts cited have recognized the importance of giving federal officials a federal forum in which to defend themselves against charges arising from the performance of their official duties. Actions taken by federal officials while performing their duties are "under color of office" for removal purposes, and their propriety must be examined in federal court, when the federal official requests removal. *Willingham* v. *Morgan, supra; Malone* v. *Longo, supra; Preble* v. *Johnson,* 275 F.2d 275 (10th Cir. 1960).

2. CONCLUSION

The record in this case and application of the law as formulated by this Court in *Willingham* compel the conclusion that Mr. Kaplan has the right to be heard in a federal forum. The order of the Court of Appeals for the District of Columbia Circuit denying him that right conflicts with the decisions of this Court. To correct that conflict, Mr. Kaplan's petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

RILEY POINTER, *et al.*, *Plaintiff*,	)	
v	)	Filed July 13, 1973
JEROME A. KAPLAN, *Defendant*.	)	Civil Action No. 79-0939

ORDER

This motion having come before the court on Defendant Kaplan's Motion for Summary Judgment on Plaintiffs' Common Law Complaint Removed from Local Court – Immunity, the court being fully apprised in the matter, and it appearing to the court that summary judgment is proper because Defendant Kaplan is immune from this lawsuit, it is this 11th day of July, 1979.

ORDERED that Defendant Kaplan's Motion for Summary Judgment on Plaintiffs' Common Law Complaint Removed from Local Court – Immunity is GRANTED, and it is

FURTHER ORDERED that this action be dismissed with prejudice.

/s/ Thomas A. Flannery

UNITED STATES DISTRICT COURT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

RILEY POINTER,
PAUL S. SHUPP,
Appellants

v

JEROME A. KAPLAN,
Defendant.

Filed June 30, 1980
Appeal No. 79-1969
Civil No. 79-0939

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: McGOWAN and EDWARDS, Circuit Judges and SHIRO KASHIWA*, Judge, United States Court of Claims.

JUDGMENT

This case was taken under submission on the record, and the briefs filed by both parties. Local Rule 11(d). From the face of the record, and the representation in appellant's brief that appellee's alleged liability derives from acts outside the scope of his official authority, it appears that the case was not subject to removal from the Superior Court for the District of Columbia, *see* 28 U.S.C. § 1442(a)(1), and that the United States District Court therefore did not have jurisdiction to entertain it on removal. It is therefore

*Sitting by designation pursuant to 28 U.S.C. § 293(a).

ORDERED that the judgment of the District Court is hereby vacated; and the case remanded to the District Court with directions that it be returned to the Superior Court.

Per Curiam
For the Court

/s/ George A. Fisher
Clerk

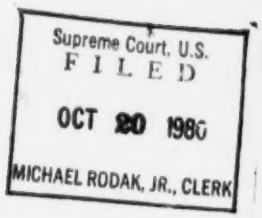
Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-506



JEROME A. KAPLAN,

Petitioner

v.

RILEY POINTER

AND

PAUL S. SHUPP,

Respondents

MOTION FOR LEAVE TO PROCEED IN

FORMA PAUPERIS

Riley Pointer and Paul S. Shupp, the Respondents, respectfully move the Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 53 of this Court and to file herein their response to the Petition for Writ of Certiorari to this Court filed by Petitioner in single counterpart, without printing the same. The typed brief of the Respondents in opposition is presented herewith.

The affidavits of Riley Pointer and Paul S. Shupp in support of this motion are filed herewith.

Dated October,_____, 1980

Respectfully Submitted,

RILEY POINTER
4121 Stanley Street, S. E.
Washington, D. C. 20019
(202) 584-5182

PAUL S. SHUPP
9412 Tuckerman Street
Seabrook, Maryland
( ) 577-2282

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Respondents' Motion for Leave to Proceed in Forma Pauperis and Affidavits were mailed, postage prepaid, this _____ day of October, 1980 to the following party:

Mark W. Foster
Moore & Foster, P. C.
1625 K Street, N. W.
Suite 500
Washington, D. C. 20006
(202) 466-6430

RILEY POINTER

PAUL S. SHUPP

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-506

JEROME A. KAPLAN,

Petitioner

v.

RILEY POINTER

AND

PAUL S. SHUPP,

Respondents

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

RILEY POINTER, pro se
4121 Stanley Street, S. E.
Washington, D. C. 20019
(202) 584-5182

PAUL S. SHUPP, pro se
9412 Tuckerman Street
Seabrook, Maryland
( ) 577-2282

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-506

JEROME A. KAPLAN,

Petitioner

v.

RILEY POINTER

AND

PAUL S. SHUPP,

Respondents

AFFIDAVIT

DISTRICT OF COLUMBIA, ss:

Paul S. Shupp, being duly sworn, on oath disposes and says:

1. He is a Respondent in the above-entitled action and makes this Affidavit in support of his motion for leave to proceed in forma pauperis herein.

2. He is 53 years old and is employed by the General Services Administration.

3. All of his income goes for the support of his wife and child.

4. Because of his poverty, Affiant is unable to pay fees and to pay or give security for costs of this appeal and still be able to provide himself and his family with the necessities of life.

5. This is a brief in opposition to a petition for writ of certiorari to the United States Supreme Court. The petition does not raise substantial questions of public importance or constitutional law as alleged by the petitioner. Affiant believes he is entitled to the redress sought in this court.

PAUL S. SHUPP

Subscribed and sworn to before me this 31 day of October, 1980.

NOTARY PUBLIC

My Commission Expires:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-506

JEROME A. KAPLAN,

Petitioner

v.

RILEY POINTER

AND

PAUL S. SHUPP,

Respondents

AFFIDAVIT

DISTRICT OF COLUMBIA, ss:

Riley Pointer, being duly sworn, on oath disposes and says:

1. He is a Respondent in the above-entitled action and makes this Affidavit in support of his motion for leave to proceed in forma pauperis herein.

2. He is 56 years old and is retired because of medical disability from his job as an Operating Engineer for the General Services Administration.

3. The disability payments received from the Civil Service Commission, provides almost all of his income.

4. Because of his poverty, Affiant is unable to pay fees and to pay or give security for costs of this appeal and still be able to provide himself and spouse with the necessities of life.

5. This is a brief in opposition to a petition for writ of certiorari to the United States Supreme Court. The petition does not raise substantial questions of public importance or constitutional law as alleged by the petitioner. Affiant believes he is entitled to the redress sought in this Court.

RILEY POINTER

Subscribed and sworn to before me this 21st day of October, 1980.

NOTARY PUBLIC

My Commission Expires: 12-14-83

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-506

JEROME A. KAPLAN,

Petitioner

v.

RILEY POINTER

AND

PAUL S. SHUPP,

Respondents

BRIEF IN OPPOSITION

TO THE PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondents, Riley Pointer and Paul S. Shupp, pray that this Court deny Petitioner, Jerome A. Kaplan, Petition for Writ of Certiorari to review (hereinafter cited as Petition) the decision of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 30, 1980. (Copy of decision attached).

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REASONS FOR DENYING WRIT

UNITED STATES SUPREME COURT PRECEDENT FULLY SUPPORTS THE COURT OF APPEALS JUDGEMENT BELOW ON COLOR OF OFFICE AND SCOPE OF AUTHORITY

Petitioner endeavors to circumvent the decision of the Court of Appeals for the District of Columbia Circuit on the basis of inapposite case law and tortured constitutional reasoning. All of his arguments were fully briefed by the Court of Appeals and flatly rejected.

The Court should not hear this case because Justice Marshall, writing for a unanimous Court, in Willingham vs. Morgan, set forth the test for determining whether a federal official meets "color of office."

> 1 "Past cases have interpreted the "color of office" test test to require a showing of a "casual connection" between the charged conduct and asserted official authority."

The U. S. District Court found the petitioner guilty of intentionally inflicting emotional distress as well as other charges.

The U. S. Court of Appeals found the petitioner guilty of acting beyond his official authority.

Even if the petitioner was acting within the scope of his authority, under Bivens vs. Six Unknown Federal Narcotics Agents it states:

> 2 "victums of a constitutional violation by a federal official have a right to recover damages against the official in federal court despite the absence of any Statute conferring such a right."

Intentionally inflicting emotional distress is a local court matter.

1 Section 1442 (A) (1)

2 403 U. S. C. 388

STATEMENT OF THE CASE

The Respondents, Riley Pointer and Paul S. Shupp, filed a suit against the petitioner in the U. S. District Court asking for a jury trial but the petitioner asked for a summary judgement and it was granted. The Honorable Judge Flannery found the petitioner guilty of intentionally inflicting emotional distress upon the Respondents ..... " that Mr. Jerome Kaplan of the General Services Administration with full knowledge of the aforesaid facts conspired during both government working hours and non-working hours in violation for the Fourth and Ninth Amendments to the Constitution of the United States to threaten and harass the Plaintiffs, and then assisted in the institutional concealment of the threatening and harassing telepone calls."

"A fair reading of the complaint indicates that Kaplan allegedly conspired with himself to harass the plaintiffs by telephone and then, in a separate conspiracy with the other defendents, conspired to conceal the identity of the caller. Defendent Kaplan correctly notes that it takes two to conspire." Mr. Kaplan went on a frolic of his own, threatening and harassing the Respondents during work and non-work hours, calling Mr. Shupp a "goddamned nigger lover," and Mr. Pointer a "black S.O.B."

NOT TO BE PUBLISHED - SEE LOCAL RULE 8 (f)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1964 September Term, 19 79

Riley Pointer, Paul S. Shapp, Appellants

United States Court of Appeals for the District of Columbia Circuit

FILED JUN 30 1980

GEORGE A. FISHER CLERK

Civil No. 79-0939

v.

Jerome Kaplan

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: McGOWAN and EDWARDS, Circuit Judges and SHIRO KASHIWA*, Judge, United States Court of Claims

J U D G M E N T

This case was taken under submission on the record, and the briefs filed by both parties. Local Rule 11(d). From the face of the record, and the representation in appellant's brief that appellee's alleged liability derives from acts outside the scope of his official authority, it appears that the case was not subject to removal from the Superior Court for the District of Columbia, see 28 U.S.C. §1442(a)(1), and that the United States District Court therefore did not have jurisdiction to entertain it on removal. It is therefore

ORDERED that the judgment of the District Court is hereby vacated; and the case remanded to the District Court with directions that it be returned to the Superior Court.

Per Curiam
For the Court

George A. Fisher
Clerk

*Sitting by designation pursuant to 28 U.S.C. §293(a).

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

> that Mr. Jerome Kaplan of the General Services Administration with full knowledge of the aforesaid facts conspired during both government working hours and non-working hours in violation for the Fourth and Ninth Amendments to the Constitution of the United States to threaten and harass the Plaintiffs, and then assisted in the institutional concealment of the threatening and harassing telephone calls.

A fair reading of the complaint indicates that Kaplan allegedly conspired with himself to harass the plaintiffs by telephone and then, in a separate conspiracy with the other defendants, conspired to conceal the identity of the caller. Defendant Kaplan correctly notes that it takes two to conspire., Duplex Printing Press Co. v. Deering, 254 U.S. 443, 465 (1921); Neff v. World Publishing Co., 349 F.2d 235, 257 (8th Cir. 1965); Zelinger v Uvalde Rock Asphalt Co., 316 F.2d 47, 51-52 (10th

> Defendant Kaplan is not being charged with being a member of a "conspiracy" but is being charged with harassing and threatening both Plaintiffs and with obstructing the investigation . . . into the telephone calls . . . The action against Defendant Kaplan is not based on "conspiracy" theory but is based on the unlawful and intentional violation by Kaplan of the constitutional and common-law rights of both Plaintiffs.

[6] Title 42 U. S. C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

A wife is not responsible for the conduct of her husband.

Prior to *Bivens*, this Court in *Bell* v. *Hood*, 327 U. S. 678 (1946), held that an individual who brought suit against federal agents for an alleged violation of his constitutional rights had in a strictly procedural sense stated a claim that "arises" under the Constitution and must be entertained by federal courts. *Id.*, at 681–682. The Court did not, however, hold that the Constitution confers a substantive right to damages in this context. Rather, it merely decided that the proper disposition of the suit was a ruling on the merits, dismissal for want of jurisdiction.[4]

Is threatening to kill an employees daughter an official government duty?

action for damages under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, under which it was established that victims of a constitutional violation by a federal official have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.

Does the use of racial slurs come under color of office?

"We do not believe that this settled principle of law was abolished by Sec. 1983, which makes liable every person who under color of law deprives another person of his civil rights."

Is the intentional infliction of emotional stress a local court matter?

6/ At first, the Supreme Court seemed to indicate that the broad scope of 42 U.S.C. §1983 precluded any immunity for state officials See, e.g., Smith v. Allwright, 321 U.S. 649 (1944); Lane v. Wilson, 307 U.S. 268 (1939). However, the Court has since carved out absolute immunities for state legislators, Tenney v. Brandhove, 341 U.S. 367 (1951), state judges, Pierson v. Ray, 386 U.S. 547 (1967), and state prosecutors, Imbler v. Pachtman, 424 U.S. 409 (1976). In addition, the Court has fashioned a qualified "good faith" immunity for the superintendant of a state mental hospital, O'Connor v. Donaldson, 422 U.S. 563 (1975); school board members and other school officials, Wood v. Strickland, 420 U.S. 308 (1975); state police officers, Pierson v. Ray, supra, 386 U.S. at 557; and state governors and other high state executive officials, Scheuer v. Rhodes, 416 U.S. 232 (1974).

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION

DATE: January 19, 1976 Region 3
Washington, DC 20407

REPLY TO ATTN OF: Manager, South Area (3PFS)

SUBJECT: Threats against Mr. Riley Pointer and Mr. Paul Shupp

Director, Federal Protective Division (3PS)

This is to inform you that telephone threats of bodily harm have been made against Mr. Riley Pointer and Mr. Paul Shupp of the Operating Engineer Shop, Agriculture Field Office. These threats have, according to Mr. Pointer, been occurring for some time, at home and at work, and are continuing.

An investigative report has been made by BI-3, with disciplinary action proposed against both Mr. Pointer and Mr. Shupp as a result. I am informing you so you are aware of the situation and can provide appropriate protection for them while they are on duty.

Further, I feel it is inconsistent that after two of our employees receive threatening calls, we (GSA) take no action that I am aware of to protect them and that we propose a suspension for their admitted acts to try to protect themselves.

Your help and cooperation will be appreciated.

T. W. HARRINGTON
Manager
South Area

13/ Granger follows a long line of pre-Butz cases applying the Barr absolute immunity doctrine to the tort of intentional infliction of emotional distress, Sowder v. Damron, 457 F.2d 1182, 1184-86 (10th Cir. 1972), as well as to a wide variety of other common law torts. See, e.g., David v. Cohen, 132 U.S. App. D.C. 333, 337, 407 F.2d 1268, 1272 (1969) (defamation, abuse of process, and malicious prosecution); Berberian v. Gibney, 514 F.2d 790, 793 (1st Cir. 1975) (abuse of process); Peterson v. Weinberger, 508 F.2d 45, 52 (5th Cir.), cert. denied sub nom., Peterson v. Mathews, 423 U.S. 830 (1975) (interference with contractual relations); Estate of Burks v. Ross, 438 F.2d 230, 234-36 (6th Cir. 1971) (negligence); Ruderer v. Meyer, 413 F.2d 175, 178-79 (8th Cir.), cert. denied, 396 U.S. 936 (1969) (defamation and conspiracy).

FACTS

1. Paul S. Shupp is a fifty-three year old Caucasian male who has been employed by the United States Government since 1946. He is currently a Lead Foreman Operating Engineer for the Public Building Service, Region 3, General Services Administration.

2. Riley Pointer is a fifty-six year old Black male who was employed by the United States Government from 1944 through 1978. He was an Operating Engineer for the Public Building Service, Region 3, General Services Administration until 1978. Mr. Pointer was also chairman of the grievance committee for the American Federation of Government Employees, Local #2151. As head of this Committee, he represented union members in discrimination suits in front of the Equal Employment Opportunity Commission and the Civil Service Commission.

3. Since early 1970, Mr. Shupp and Mr. Pointer have filed many complaints charging racial discrimination on behalf of fellow employees of the General Services Administration.

4. In February, 1975, both Respondents began receiving harassing and threatening telephone calls as their homes. The calls contained racial overtones stating that if the filing of discrimination complaints was not stopped, both Shupp and Pointer would be killed.

5. After continued threatening calls to his family, Mr. Pointer took his daughter, Rocheena out of public school, and a second daughter, Betty Anne, was allowed to remain on the Bowie State campus instead of commuting to school from home.

6. The continual threatening calls put Mr. Shupp's family into a state of fear. Mr. Shupp and his family suffered from anxiety and agitation caused by the nature of the anonymous calls. In fact, Mr. Shupp was hospitalized for nervous tension as a result of these calls.

7. The continual threatening calls put Mr. Shupp's family into a state of fear. Mr. Shupp and his family suffered from anxiety and agitation caused by the nature of the anonymous calls. In fact, Mr. Shupp was hospitalized for nervous tension as a result of these calls.

8. On May 5, 1975, Mr. Shupp and Mr. Pointer notified the District of Columbia Police Department and the Federal Bureau of Investigation about the telephone calls, and received promises of assistence from both law enforcement agencies.

9. At this point, Mr. Pointer and Mr. Shupp began receiving threatening phone calls at work, rather than at home. Mr. Shupp then taped a conversation with the anonymous caller at work. Later that day, Mr. Pointer identified the voice as the one that was making the calls to him.

10. Mr. Pointer and Mr. Shupp played the taped phone conversation to Mr. James Austin, Buildings Manager, South Area, Public Building Service, Region 3, General Services Administration and he (Mr. Austin) recognized the disguised voice as that of Mr. Jerome Kaplan, Special Assistant to the Director, Management Operation Division, Public Building Service, Region 3, General Services Administration. Mr. Austin later spoke to certain General Service Administration investigators and again stated that he recognized the voice on the tape as that of Mr. Jerome Kaplan.

11. Mr. Austin questioned Mr. Kaplan concerning the threatening telephone calls to Mr. Pointer and Mr. Shupp. Mr. Kaplan indicated that he made the calls to persuade Mr. Pointer and Mr. Shupp to only represent complaints of the Operating Engineers and not those of other employees.

12. Mr. Pointer and Mr. Shupp played the taped phone conversation to Joseph F. Russell, President, Local 2151, of the American Federation of Government Employees, who recognized the anonymous voice on the tape as that of Mr. Kaplan.

13. On March 2, 1976, Mr. Charles Cobbs received an anonymous telephone call intended for Mr. Pointer at work in which the caller threatened to come down and kill Pointer for filing complaints of discrimination in the General Service Administration. Mr. James Austin, the Building Manager, had Mr. Charles Cobbs escort Mr. Pointer to his car and suggested that Mr. Pointer cease work for the day.

14. The harassing calls continued until April, 1976, when they stopped.

15. On the basis of the aforesaid allegations, Respondents declare that Mr. Jerome Kaplan intentionally inflicted mental distress on Respondents by making threatening and abusive telephone calls to Respondents and their families.

QUESTIONS PRESENTED

1. Is a government official covered by the color of his office when he intentionally inflicts emotional distress upon an employee?

2. Is a GSA official covered by the color of his office when he conspires with himself to threaten and harass employees during working and non-working hours?

3. Is a GSA official covered by the color of his office when he constantly uses "racial slurs" when talking with employees, such as "black son of bitch, if you bring anymore complaints at 7th & D, I'll kill you." When talking to the white employee, the words used were, "you goddamned nigger lover." In Monroe vs. Page, police officers were not immune even if they acted in good faith, because it was improper to admit evidence of Appellants' racial views.

4. Does a GSA officials duties include threats to kill an employee's family?

5. Is a GSA official entitled to be heard in a federal court when he goes on a frolic of his own?

6. Was the petitioner given authority to perform these criminal acts against employees and their families?

7. Can a GSA official intentionally violate the consitutional rights of an employee?

Chief Justice Warren, writing for the Court, dissented:

> 1 "We do not believe that this settled principle of law was abolished by Sec. 1983, which makes liable every person who under color of law deprives another person of his civil rights."

1 42 U. S. C. Sec. 1983

Gregoire v. Biddle states:

1 It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liablility for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome ...."

CONCLUSION

For all of the reasons set forth above, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

RILEY POINTER, pro se
4121 Stanley Street, S. E.
Washington, D. C. 20019
(202) 584-5182

PAUL S. SHUPP, pro se
9412 Tuckerman Street
Seabrook, Maryland
( ) 577-2282

1 177 F. 2d 579 (2d Cir. 1949)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Respondents' Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit were mailed, postage prepaid, this _____ day of October, 1980 to the following:

Mark W. Foster
Moore & Foster, P. C.
1625 K Street, N. W.
Suite 500
Washington, D. C. 20006
(202) 466-6430

RILEY POINTER, pro se
4121 Stanley Street, S. E.
Washington, D. C. 20019
(202) 584-5182

PAUL S. SHUPP, pro se
9412 Tuckerman Street
Seabrook, Maryland
( ) 577-2282

FEDERAL BUREAU OF INVESTIGATION

Exhibit D

Date of transcription 11/2/76

JAMES H. C. AUSTIN, Building Manager, General Services Administration (GSA), Agricultural Building, Room 1509, 14th and Independence Avenue, N.W., Washington, D. C. (WDC), telephone 447-3335, was advised of the identity of the interviewing agents and the purpose of the interview. AUSTIN provided the following information:

He stated that sometime in March or April of 1976, RILEY POINTER came to his office and told him of the threatening and harassing telephone calls which he (POINTER) had been receiving at work and at home. POINTER at this time had a cassette tape in his possession of the caller who had been making the threats. AUSTIN stated that he and POINTER listened to the tape and they simultaneously wrote the name of the person they believed to be the caller on separate pieces of paper. When he and POINTER compared what they had written, the name JEROME KAPLAN was written on both pieces of paper. He stated that they then both verbally agreed that the voice on the tape is that of JEROME KAPLAN.

AUSTIN advised that after POINTER left his office, he called KAPLAN and asked him if he had been making the calls to POINTER. KAPLAN told AUSTIN that he did make the calls because POINTER is going outside of his authority as chairman of Local 2151 of A.P.G.E. by drumming up business from other unions and thereby violating union contracts. KAPLAN told AUSTIN that he talked "black dialect" to disguise his voice and gave POINTER phony information so he would drive all over town to meet fictitious people. AUSTIN stated that KAPLAN advised him that at no time did he make any threat of bodily harm to POINTER.

AUSTIN stated that KAPLAN had received complaints from other unions to the effect that POINTER was interferring in their affairs and the telephone calls were intended to put a stop to this activity.

---

1 Interviewed on 10/26/76 at Washington, D. C. File # 173-298

[redacted]

by SA DAN G. HODGES:caj Date dictated 11/1/76

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

4
3-17-76

on 3-2-75
I received a phone call at 7:35 P.M.
a man said you tell that Gad dam
Riley Painter
if he send in anymore complaints
I am going to kill the dam son of
a Bitch and by the way I will
be down there in a few minutes

Charlie L. Cobb

in Gregoire v. Biddle, 177 F.2d 579, 581 (2nd Cir. 1949):

> . . . It can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine.

Jan. 28, 1976

Dear Mr. Austin:

This is a report of the telephone call I received Dec. 29, 1975.

I was in charge of the shift. Around 6:00 or 7:30 P.M. the phone rang. I answered it saying "Engineer's Office, Pointer speaking."

The caller said "You Black Son of a Bitch. If they can't stop you from going to 7th & D I will."

It appears that the caller had the phone or his mouth covered. Therefore I could not identify it as being the same voice as the one on the tape.

Thank you

Riley Pointer

Riley Pointer - respondent, was a WG-10 Operating Engineer at that time. He was also the Chairman of the Grievance Committee of Local 2151-AFGE. As Chairman of the Grievance Committee, Mr. Pointer was over all of the shop stewards, 28 groups in the Metropolitan area which combines Pennsylvania, Virginia and West Virginia. On many occasions the respondent was called upon by the President of the union to represent employees in different groups. In the report Mr. James C. Alston made to the FBI, he stated that Mr. Kaplan, the petitioner, admitted to him that he (Mr. Kaplan) had made the threatening calls. Mr. Kaplan also stated he made the calls to keep the respondent from representing employees outside the Agriculture group. This in itself is a violation of his own rules - Ord. 36-30, which states an employee has the right to have representation of his own choosing without interference, coercion or reprisal. This order covers the representative also.

The petitioner disguised his voice as a black man and harassed and threatened the respondent for more than a year and at one point, the respondent had to be escorted out of the building thru the side door because the caller said he was coming into the building to kill the respondent.

The question here is - can the petitioner commit this type of criminal act under the cover of official business?

If the petitioner thought the respondent was doing something wrong, he should have called the respondent, using his own voice and identifying himself and discussed the situation in a civilized manner.

Instead, the petitioner mounted a campaign of continous persecution and abuse against the respondent while flagrantly violating and ignoring the laws that govern such circumstances and now claims this was all done as his official duty.

Nancy Pointer - wife of the respondent Riley Pointer, because of the threatening phone calls, became a prisoner in her own home. The FBI suggested having the phone number changed, but the respondent was seeking means to have the phones tapped, so he had a new phone installed. This was added expense plus the mental and physical distress of being afraid to answer your own phone.

A family is not responsible for the conduct of the husband. The wife cannot be held responsible for his actions unless she collaborated with him and it must be proved that she did collaborate with him.

This criminal act of harassing an entire family was certainly not within the scope of the petitioners official duty.

Rocheena Pointer - daughter of the respondent Riley Pointer, was constantly threatened by the caller, who said "if we can't find him, we will get you." She was attending Eastern High School at the time, where dope addicts and drop-outs could walk in and out as they pleased. She was afraid the caller could also come into the school. Seeing his daughter endure this mental anguish caused the respondent to enroll her in a private school (St. Cecelia) which placed an additional financial burden on the respondent.

Betty Ann Pointer - daughter of the respondent Riley Pointer, was attending Bowie State College, but was commuting with a group of other students in order to cut down on expenses. The caller constantly threatened her life, saying they would get her if they were not able to get her father. This finally made her so upset she was afraid to come home and also made her unable to concentrate on her studies.

It was then decided that she would stay on campus, which further burdened the respondents already strained finances by having to pay the room and board. The respondent and his wife had to regularly call the campus and see if their daughter was all right and remind her to stay close to school for her own protection. This stressful situation finally caused their daughter to come down with a nervous condition, which was manifested by an unconfortable rash and her hair began to fall out. She was attended by the medical office on campus. The physicans stated these problems were the result of a nervous condition.

Besides the financial strain, the respondent and his family had to bear the mental and physical effects of the threatening phone calls. There is no way the petitioner can include threats against children in his official duties.

Paul Shupp - respondent, is not a member of the union and has never represented an employee but he did give several black emplyees outstanding ratings and was also accused by the agency (GSA) of rating all the employees he supervised as outstanding. However, after three years of investigating, the agency found that Mr. Shupp did not rate all the employees he supervised outstanding.

Mr.Shupp has filed several complaints on his behalf and has assisted Riley Pointer in other complaints. Mr. Shupp was constantly threatened two or three times a week over a period of one year or more. The caller would say "we're going to get you, nigger lover." What was confusing was the caller had disguised his voice as a black man. After many months of these threats, Mr. Shupp began to have stomach problems and had to be hospitalized.

The question here is - can a government official disguise his voice to make threatening phone calls and then use his official status as a defense and claim immunity? Simple justice would demand he be tried in a lower court as an individual and not as a government official.

Mr. Shupp's wife was made a prisoner of her own home, afraid to leave home and afraid to return. She almost had a nervous breakdown because of the calls.

EXHIBIT A

AFFADAVIT

I, Riley Pointer, Operating Engineer, Public Building Service, General Services Administration, do hereby make the following statement:

In the spring of 1975 (late in February) I started receiving calls at my home and the caller identified himself as Hawkins, Wilson or some other name. He would leave the number and when I returned the call the number would be for HEW or the Pentagon. There would be no one in the offices by those names. The caller would leave fictitious numbers and when I returned the calls it would be the D. C. Morgue, Rhines Funeral Home or a cemetary. I stopped returning the calls and then it started in a threatening manner - We got a contract on you - and it got worse. The caller would call on the job and I began to complain to the General Foreman, Mr. McComb. I called Mr. Mitchell's office, (the Office of Civil Rights) at General Services Administration. Someone in his office told me to call Mr. Joseph Daniel. He was out of town. I got in touch with Ms. Diane Smith, Regional Director, Office of Civil Rights, 3AR. She was not in so I called Mr. Collins. I explained all through the day and night I received calls threatening to kill me - We are going to do you in. There is a contract out on you. Go to the cemetary and dig a hole and lie down and wait until we get there -. My family was called and told - We are going to get him, where is he? The caller told my daughter - If we can't get him, we will get you-. I told my daughter we would take her out of ~~private~~ public school. We decided to keep my other daughter on the university campus. The second daughter was driving back and forth to school so we decided to leave her on campus which incurred considerable additional expenses.

On May 5, 1975, I notified the police. They told me to call the FBI. The police promised to patrol the area more. I called the FBI. They said they would have to get permission to tap the telephone. I called the telephone company and they assigned me to a telephone counselor. I said my job is different, I work at night traveling in dark buildings and hallways. It was suggested that I change my telephone number. I said, I am the Chariman of the Grievance Committee with the Local and all the employees as well as management officials have to have my telephone number I told the telephone company that I thought that it was somebody

on the job. I let it go and wouldn't change my number. The calls just kept coming. I went to Mr. Waller's office and talked to Ms. Pearl Shaeffer. She suggested I put in another telephone for my wife and leave the old telephone in another room. I put in another telephone and directed my daughters to give only their friends the new number. The calls got worse and since I was the only one answering the old number, I went back to Mr. Collins in Diane Smith's office. I said, isn't there something that the agency can do? He said I know of no rules or regulations that would help you. We got into a discussion. I am going to start carrying a gun and tap my home telephone. After telling him that I was going to tap my telephone, I got a little pick up so that I could tap my telephone. From the day I talked to Collins, I didn't get another threatening call at home. I called Mr. Collins and said for two weeks I received no calls since I talked to you. Maybe you talked to some of the managers. He said no, so I said maybe they will quit. Then the caller started calling on the government telephone. He would first call and hang up. Then he would ask for Paul Shupp. Paul told me that he was getting calls at his home, the same type of calls, and when the calls stopped coming over my telephone they stopped coming over his too. These calls were coming in on the government telephone and the caller would ask for us then hang up. Finally, we started receiving threatening calls. I could see that nobody was going to do anything about the calls. In the meantime, I wrote to practically all the Congressmen on the Civil Service Committee telling them about it.

The calls got terrible in language i.e., calls to Mr. Shupp - You damned nigger lover, we are going to get you. When I answered the telephone - We are gonna get you, we are going to do you in you black son of a bitch-. I could not respond because the caller would hang up. It seemed to be a black individual's voice, and that was what confused us.

When I went on vacation, the caller called my supervisor, Mr. McComb. When I returned Mr McComb said I got that man again and he asked about you and what you were doing. He said he was going to get your secretary. I wrote back to the Office of Investigations and told them

that they were the only ones who knew that I had a secretary. The investigator's name is Mr. Oberg. We decided to tap the government phone (me and Shupp). Shupp was the supervisor and he stayed in the office and he would get more calls than me. One Wednesday night, a man called and said that he was the shop stewart out in McLean and he stated his name. I called the president of the union and asked him if there was a shop stewart by the name the caller had given. I started to erase the tape - but decided not to since I did not asked the supervisor if the shop stewart was black or white. He replied that he was white and that he had death in the family and was away in Hagerstown, Md. I was off on Thursday night and the caller called again and Shupp taped the call and the caller was asking for me. Recognizing his voice as the same caller, Shupp kept him on the phone as long as possible. He was disguising his voice as black, but then he revealed his true voice by talking long. Shupp played the tape at my home and I recognized the voice. I was so relieved and said I know who it is and tomorrow morning I will go to Mr. Waller's office and take the tape. Shupp said we should wait for a threatening call. Being relieved, I said let's take this tape now. I took it to Mr. Waller's office and he said he could not do anything about it. Mrs. Shaeffer told me to take the tape to the Office of Investigations. I took it to the Office of Investigations and Mr. Pavel who is in charge asked me to play the tape. He showed no emotion and said he did not recognize the voice and said I was in the wrong place, then I was sent to another office. I was given a name and told that the man was located around the corner. Unable to find the individual, I went to Mr. Waller's office and asked Mrs. Shaeffer for assistance in locating the man. After she looked in the book, she said he must be at 18th and F. Still unable to locate him, I returned to Mr. Daniel's office and someone in his office told me to file a complaint to Mr. G. C. Gardner, Assistant Administrator for Administration Mr. Gardner sent the complaint to Mr. Galuardi asking him to make an investigation of it, and it went right back to Mr. Pavel, Office of Investigations. Instead of trying to identify the voice of the person on the tape, the Office of Investigations investigated me, and gave me 5 days off for taping the government telephone and carrying a weapon. Everyone who has worked with the caller has identified the voice.

After 5 months I didn't question anyone else and assuming they were not investigating, I asked for the return of my tapes. They were returned after 5 or 6 months. I wrote a letter to Mr. Galuradi telling him to send my complaint as well as the complaints I represent to Central Office and he did.

Mr. Pearson - Who will corroborate the first voice on the tape as Jerome Kaplan?

Mr. Pointer - Joseph Russell, President Local 2151 - AFGE, night telephone 565-9133

Russell was the only one who would say publically he believed the voice to be that of Kaplan. Although others have admitted that they recognize the voice as Kaplan they would not admit to this publically.

After I won the Civil Service Commission (CSC) case involving the 3rd party discrimination complaint, GSA refused to correct the deficiency and I appealed it to the CSC. The CSC gave GSA 1 year to make the correction. This was when the threats picked up. One night, I was on the out building and Mr. Charley Cobbs received a call and the caller asked, - was I in? - Charley said - no, is there a message? - The caller said, - if Riley files another discrimination complaint, I am going to kill the son of a bitch. - The caller said, - no, just a minute, I am coming down there right now and kill the son of a bitch. When I got back Charley told me, so I called the General Foreman, Mr. McComb and he told me to call the building manager. Just before I called Mr. Austin, Mr. Cobbs went out and when I got Mr. Austin he asked for Cobbs, I said he was out. Austin said, lock yourself up in the General Foreman's office and don't leave out until Cobbs gets back and have him call me. When Charley returned and returned the call Austin asked Cobbs to take me to my car - he did and I went home.

Charley Cobbs
Office No. 447-5516
Work Hrs. 4-12
Off on Wednesdays & Thursdays

Mr. James Queen and John Billa wrote letters to Mr. Austin telling what they had heard on the phone. I recognized the callers voice because I went to school with him. Ninety percent of the cases that I handle, the caller processed them in one way or another.

Mr. Pearson - Does anyone else recognize Kaplan as being violent?

Mr. Pointer - Only Mr. Duel and Duel's charges against Kaplan.

I think someone should be questioned as to why no effort was made to give us some type of relief. I went to Mr. Waller's office and told him that I thought I was in the right office.

Then the area manager, Mr. Harrington, had the responsibility to see that we had safe working conditions yet the only time he made any type of response was to write up and give me 5 days off. We constantly received call after July 1975, for a year and nobody made a move. It seems that management officials are more interested in the time it happened and what was said, but don't want to know who is making the calls.

After 5 months Mr. Gardner did not follow the complaint up. Then more than 2 months have past since Mr. Hardgrove had the complaint and action is just now being taken. It is my feeling it is not just the caller. We got rumors that they were going to get rid of me and Shupp, but we understood that to mean that we were to be fired. We contacted Diane Smith, Region 3 and filed a complaint and we received a letter from her that a thorough investigation was going to be made. The investigation was going fine for a while then suddenly she stopped. This happened about 2 months before the calls.

Mr. Pearson - Are you still with Agriculture ?

Mr. Pointer - Yes - I am still located at the Dept. of Agriculture and they treat me fine but I did get a bad efficiency rating.

(Mr. Pointer showed his last years rating which was outstanding. It had been approved by the rating and reviewing official.)

Mr. Austin later changes the rating in 2 places.

Mr. Pearson - Did you appeal the rating?

Mr. Pointer- No, because that was during the time of the threats and I was upset.

Then this year the building manager and Mr. McCobb would not allow Shupp and Billa to rate me. I ended up with a very poor rating.